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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1456

MATTHEW IANNIELLO,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

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October Term, 1974

No.

MATTHEW IANNIELLO,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Matthew Ianniello, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this case on February 20, 1975.

Opinions Below

Petitioner was indicted in the Supreme Court of the State of New York, County of Kings, upon four specifications of criminal contempt (former Penal Law § 600, subd. 6). That Court dismissed the indictment upon the ground that Petitioner, while appearing before the Grand Jury, had been denied access to his attorney. An appeal was taken by the prosecution to the Appellate Division of the Supreme Court, First Judicial Department. That Court affirmed the dismissal of the indictment, *People* v. *Ianniello*, 27 A.D. 2d 504, 280 N.Y.S. 2d 852 (1967).

The opinion of the Appellate Division is reproduced as Appendix D hereto (24a-31a).* A further appeal was taken by the prosecution to the Court of Appeals of the State of New York. That Court reversed the determinations of the lower courts and ordered that the indictment be reinstated, *People* v. *Ianniello*, 21 N.Y. 2d 418, 288 N.Y.S. 2d 462 (1968) (Appendix C hereto, 13a-23a).

Thereafter, Petitioner was convicted in the Supreme Court of the State of New York, First Department, and his conviction was affirmed, without opinion, by the Appellate Division of that Court, *People* v. *Ianniello*, 43 A.D. 2d 908, 352 N.Y.S. 2d 882 (1974). He further appealed to the Court of Appeals of the State of New York, which affirmed, in an opinion, *People* v. *Ianniello*, 36 N.Y. 2d 137, 365 N.Y.S. 2d 821 (1975) (Appendix B hereto, 4a-12a).

Jurisdiction

The Order of the Court of Appeals of the State of New York here sought to be reviewed was dated February 20, 1975 (Appendix A hereto, 3a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3), since Petitioner is claiming rights, privileges, or immunities under the Constitution of the United States (Article VII: Supremacy of the Constitution and Laws of the United States; Fourth Amendment: Privacy, Search and Seizure; Fourteenth Amendment: Due Process of Law) and under 47 U.S.C. § 605 [June 19, 1934] c652, Title VI, § 605, 48 stat. 1103. (Unauthorized Publication or Use of Communications).

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* References to the Petitioner's Appendix which is annexed to this petition are as follows: "-a". References to the Appellant's Appendix in the Court of Appeals are as follows: "A.-". A copy of the Appellant's Appendix will be certified to this Court.

Questions Presented for Review

1. Where, by means of a wiretap, evidence was secured by the State in violation of 47 U.S.C. § 605 prior to this Court's decision in *Lee* v. *Florida*, 392 U.S. 378 (1968), does this Court's decision in *Fuller* v. *Alaska*, 393 U.S. 80 (1968), require the exclusion of such evidence from trials held after the date of the *Lee* decision?

2. Should the trial court herein have conducted a hearing to determine whether the questioning of Petitioner before the Grand Jury was the fruit of illegal electronic surveillance?

3. If the questioning of Petitioner before the Grand Jury was the fruit of illegal electronic surveillance, do this Court's decisions in *Lee* v. *Florida*, *supra*; *Fuller* v. *Alaska*, *supra*, and *Gelbard* v. *United States*, 408 U.S. 41 (1972), require that Petitioner's subsequent conviction for contempt be vacated?

4. Following his indictment, was Petitioner entitled to a copy of his intercepted communications so as to prepare for trial and so as to present a defense to the charge of contempt?

5. Particularly since the defense did not have access to the wiretap transcripts, and since there was no independent evidence of the contents of those transcripts, was Petitioner denied his Sixth Amendment right to confrontation and cross-examination when the prosecutor argued to the jury that an accurate version of the wiretapped conversations had allegedly been read to the Petitioner when he appeared before the Grand Jury?

Constitutional Provisions and Statutes Involved

This case involves the Fourth Amendment (Privacy, Search and Seizure), Fourteenth Amendment (Due Process of Law), and Article VI (Supremacy of the Constitution and Laws of the United States) of the United States Constitution. It also involves 47 U.S.C. § 605 (Wiretapping).

The State statutory provision involved is former New York Penal Law § 600, subd. 6.

All of the statutory and constitutional provisions involved are reproduced as Appendix H to this petition (43a-46a).

Statement of the Case

A. The Petitioner's Grand Jury Testimony

On June 11, 1964, Petitioner was called before a Grand Jury in New York County, and was advised that the Grand Jury was conducting an investigation "to determine if there was in existence a conspiracy to bribe or give unlawful fees to employees of the New York Police Department or of the New York State Liquor Authority" (A. 27). He was further advised that the Grand Jury was prepared to grant him immunity from prosecution (A. 27).

The questioning of Petitioner was conducted by four different Assistant District Attorneys, and, it appears that two additional Assistant District Attorneys were also present in the Grand Jury room (A. 130-131). An examination of the transcripts of the Grand Jury proceedings of both June 11 and June 18, 1964, reveals that each

of the four participating Assistant District Attorneys shot questions and derogatory comments to the Petitioner at random, frequently cutting off each other or the Petitioner. Indeed, an examination of the ninety-nine pages of Grand Jury testimony (A. 25-123), reveals that there are very few instances in which a complete page or even two consecutive pages of questioning were performed by only one Assistant District Attorney. Instead, most pages of the transcript indicate the questioning going back and forth from one Assistant to another.

After giving his name and address, and stating that he owned two restaurant-bars on West 49th Street in Manhattan, Petitioner was questioned as to whether in September, 1963, he had knowledge that he or a business associate had been under investigation by the Police Commissioner's Confidential Investigating Unit. He acknowledged that it was general knowledge in the Times Square area that bar owners were under regular surveillance (A. 29-31).

Thereafter, he acknowledged that one Benny Cohen was a business associate who owned another bar in the area, and categorically stated that no one had ever told him that one Phil Walsh, connected with the Investigating Unit, had placed Cohen "on the hit parade" (A. 32). When pressed on the question of whether he had ever had such a discussion with Cohen, Petitioner responded "I don't recall ever telling him that" (A. 32). When further pressed, the following series of answers were elicited from him:

> "I don't deny it. I don't remember the conversation. *I never heard of such a conversation.* * * * I don't recall the conversation. * * * I don't recall it. * * * *I distinctly don't remember anybody mentioning Philly Walsh to me.* I don't recall that conversation. * * * It's possible it could have occurred, but I don't remember it. *I distinctly don't remember such a conversation.*

"Q. If you distinctly don't remember it, do you deny it?

"A. You are playing on words—I'm speaking my language. If you want to be technical, I'm not technical—." (A. 33-34) [emphasis added]

Thereafter, while admitting that if he knew his friend was under investigation he would certainly tell his friend, he unequivocally stated "we discussed it but we didn't tell each other as far as anybody told us. We knew the area was under surveillance. It was common knowledge" (A. 38).

Throughout the interrogation, the interrogators frequently prefaced their questions by phrases such as "do you remember" or "do you recall" (A. 38, 41, 42, 52, 54). As a random examination of the Grand Jury minutes will reveal, whenever Petitioner was questioned as to the contents of specific conversations, he responded, in like fashion, that he could not recall (e.g., A. 38, 42).

When Petitioner requested the opportunity to speak with his attorney, who was outside the Grand Jury room, one of the Assistant District Attorneys denied that permission and berated Petitioner (A. 43-44, 47). Indeed, the foreman of the Grand Jury made clear that he was under the impression that permission to leave the Grand Jury room to consult with counsel could not be granted without the "permission" of the Assistant District Attorney (A. 47). Instead, the Assistant proposed that "we go to court for a direction." When the Petitioner agreed, the Assistant hastily backed away from that offer (A. 45).

The questioning and responses for the remainder of Petitioner's testimony followed essentially the same pattern already described. The bulk of the questioning involved three areas which formed the basis of the four counts of the indictment, and as to which Petitioner did not have a specific recollection:

1. Whether any police officers, other than a certain police captain, had been at the Petitioner's New Jersey farm during the twelve month period immediately preceding his appearance before the Grand Jury on June 18, 1964. To that series of questions, Petitioner responded, in the main, as follows:

> "I recall John because he got hurt. I don't know anybody else in the last five years. * * * Last six months, outside of John Mink, I don't think anybody's been to my farm. * * * I wouldn't deny it, but I'm almost sure nobody's been at the farm in the last six years. * * * I don't recall anybody, outside of John Mink, being at the farm. * * * I can't deny something I don't recall. * * * I don't think so. * * * I don't recall being half a dozen times at the farm [in the last year]." (A. 108-109)

2. Whether, during the two week period immediately preceding the Petitioner's appearance before the Grand Jury on June 18, 1964, he had been told and warned to stay away from a certain police sergeant because said sergeant was under investigation by the Police Department. To this series of questions, Petitioner, in the main, gave such answers as:

> "I don't recall such an incident. I wouldn't know how to get in touch with Mr. O'Shea." (A. 73)
>
> "I don't recall any such incident. * * * I don't recall any such incident in my lifetime. * * * Nothing, nothing whatsoever. I do nothing wrong, and I don't remember any police officer should stay away from me, I'm a business man—" (A. 75-76)

3. Whether Petitioner, in a certain conversation with a police sergeant, had sought and had obtained confidential information relating to a pending police investi-

gation from the sergeant and what matters were discussed in a five to ten minute conversation the defendant had with the sergeant. As regards that conversation, the Petitioner testified that he did not recall any part of the conversation or the length of time which elapsed (e.g., (A. 62). The incident in question occurred some nine months before Petitioner's Grand Jury testimony (A. 54).

In view of the description of the nature of the investigation being conducted by the Grand Jury, Petitioner's following unequivocal testimony is most significant:

> "Q. Did you ever attempt to purchase information about the investigation?
>
> "A. No, sir.
>
> "Q. Did you ever pay any money for alleged information about the investigation?
>
> "A. No, sir.
>
> "Q. Do you deny that you paid such money?
>
> "A. Yes, sir.
>
> Q. Did you ever pay the sum of a hundred dollars for information about such an investigation?
>
> * * * * *
>
> "The Witness: No, sir." (A. 115-116)

> "Q. Listen to the question, Mr. Ianniello, listen to it carefully. Did you at any time pay someone any amount of money for the purpose of obtaining information concerning an investigation being conducted by some law enforcement agency? Do I make myself clear to you? If not, I will repeat the question. Do you understand the question?
>
> "A. Yes.
>
> "Q. Now please answer.
>
> "A. No, sir.
>
> "Q. You never did? That is a fact?
>
> "A. Yes." (A. 117)

B. The Wiretaps and the Presentation of the Federal Questions

At several points during the interrogation of the Petitioner, he was asked very specific questions concerning both short and long quotations attributed to him and to others with whom he had allegedly conducted conversations (e.g., 38, 41-42). An examination of the proceedings before the Grand Jury can leave no doubt that the questions were based upon recorded conversations of the Petitioner (see for example, the extract of the Grand Jury proceedings contained in Appendix E hereto, 32a). As pointed out hereinafter, defense efforts to obtain copies of those transcripts prior to and during trial were refused by the prosecution and denied by the court. Indeed, at several points, the prosecutor refused to confirm or deny that such wiretaps existed (A. 145-7, 233, 470—"I am not prepared to assert whether in fact this is the case or not. I think it is speculation that there was a tap or an invasion of privilege of Mr. Ianniello and his wife.") Nevertheless, the prosecutor, in his summation, twice claimed, without evidentiary support that, "verbatim conversations" had been read to Petitioner during his Grand Jury testimony, and referred to "court authorized wiretapping" (A. 289).

Prior to the entry of judgment in the trial court, Petitioner's counsel specifically requested and was denied disclosure of the authorization for and the product of the wiretaps in question. Additionally, the trial court denied a defense motion to set aside the verdict of the jury upon the ground that the wiretapping had been in violation of law and a deprivation of the Petitioner's rights under the Search and Seizure provision of the Fourth Amendment. The text of the argument of these motions is set forth in Appendix F, hereto (33a-40a). Additionally, a verbatim statement of the questions presented for review in the Court of Appeals of the State of New York is set forth in Appendix G, hereto (41a-42a).

REASONS FOR GRANTING THE WRIT

1. The trial court should have conducted a hearing to determine whether the questioning of petitioner before the grand jury was based upon information learned from illegal electronic surveillance. If such was the case, then the indictment herein should have been dismissed.

In this case, the Courts of the State of New York have decided a federal question of substance in a way not in accord with applicable decisions of this Court. That question involves the use in evidence of wiretapped telephone conversations of the Petitioner seized in violation of the absolute prohibition contained in 47 U.S.C. § 605. This Court's opinion in *Lee* v. *Florida*, 392 U.S. 378 (1968) required the exclusion of such evidence in state trials. This Court's opinion in *Fuller* v. *Alaska*, 393 U.S. 80 (1968) mandated that the exclusionary rule enunciated in *Lee* was to be given effect in all trials held after the date of the *Lee* decision. The Courts of the State of New York have refused to abide by that mandate.

Here, it appears that the questioning of the Petitioner before the grand jury was based upon the interception of his telephone communications in 1966. All wiretapping conducted at that time was illegal, being in violation of 18 U.S.C. § 605. Petitioner's subsequent trial for contempt, in 1971 necessarily required the use, by the prosecution, of the fruits of that illegal wiretapping since the questioning before the grand jury was based upon it. Nevertheless, the prosecution refused to reveal what, if any, court orders had authorized the wiretapping and refused to provide the defense with copies of the conversations seized by that wiretapping. Moreover, the trial court refused to direct such disclosure or to give the defense a hearing as to the legality of the wiretapping or to suppress the evidence derived from that wiretapping. Having decided the issue adversely to the Petitioner in a

prior, unrelated opinion, *People* v. *Feinlowitz*, 29 N.Y. 2d 176, 324 N.Y.S. 2d 62, *cert. den.*, 405 U.S. 963, the New York Court of Appeals declined to discuss the issue within the context of Petitioner's case.

A. Introduction

There does not appear to be any doubt that the questioning of Petitioner before the Grand Jury was based upon information learned by the authorities from electronic surveillance (*supra*, p. 8). It is not known when that electronic surveillance took place, other than that it must have been prior to the date of his first Grand Jury appearance, June 11, 1964. During the period of such electronic surveillance, there was in effect § 605 of the Federal Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. § 605 [hereinafter, "§ 605"]. That statute provided:

> "[N]o person not being authorized by the sender shall intercept any communication and divulge * * * the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person * * *."

On June 17, 1968, in *Lee* v. *Florida*, 392 U.S. 378, this Court held that a State interception of telephone conversations violated the specific prohibition of § 605, and, therefore, evidence derived from such interceptions is not admissible in evidence in a State court trial. Two days after *Lee* was decided, the Omnibus Crime Control & Safe Streets Act of 1968, which included substantial amendments to § 605, became law. In Title III, Congress, for the first time, enacted a comprehensive scheme authorizing the interception of telephonic communications, but only when such communications were intercepted pursuant to the stringent probable cause, authorization, and implementation requirements of 18 U.S.C. §§ 2510-2519. On October 28, 1968, several months *after* the enactment of 18 U.S.C. §§ 2510-2519, this Court came to consider the

applicability of the *Lee* decision. In *Fuller* v. *Alaska*, 393 U.S. 80, the Court held that the suppression requirements of *Lee* should be given full effect only with respect to trials in which the evidence is sought to be introduced after the date of the *Lee* decision:

> "In Lee v. State of Florida, 392 U.S. 378, we overruled Schwartz v. State of Texas and held that evidence violative of § 605 is not admissible in state criminal trials. The decision of the Alaska Supreme Court cannot stand, therefore, if Lee is to be applied retroactively. *We hold however, that the exclusionary rule of Lee is to be given prospective application*, and, accordingly we affirm.
>
> "Prospective application of Lee is supported by all of the considerations outlined in Stovall v. Denno, 388 U.S. 293, 297. * * *
>
> "Retroactive application of Lee would overturn every state conviction obtained in good faith reliance on Schwartz. Since this result is not required by the principal upon which Lee was decided, or necessary to accomplish its purpose, *we hold that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in Lee.*" (393 U.S. at 80-81) [Emphasis added]

In *Kaiser* v. *New York*, 394 U.S. 280 (March 24, 1969), this Court reaffirmed the exclusionary timetable of *Fuller* (394 U.S. at 283).

On July 7, 1971, the New York Court of Appeals was confronted with a challenge to a pre-*Lee* wiretap in which the trial occurred a year after *Lee*, *People* v. *Feinlowitz*, 29 N.Y. 2d 176, 324 N.Y.S. 2d 62, *cert. den.*, 405 U.S. 963. The Court of Appeals held, notwithstanding the absolute prohibition of § 605, ". . . that in seizures made before the effective date of the Safe Streets Act, substan-

tial compliance with its provisions is all that is required to bring the evidence within the newly enacted exception to § 605."

We respectfully contend: 1) *Feinlowitz* was wrongly decided and is clearly violative of the requirements of *Lee* and *Fuller* which mandate the exclusion of wiretap evidence at all trials held after *Lee*, notwithstanding the date of interception; and 2) in any event, there must at least be a demonstration that pre-*Lee* wiretapping was conducted in substantial compliance with the requirements of 18 U.S.C. §§ 2510-2519. There was no such demonstration in the instant case. If our contention in either respect is correct, then it was illegal for the prosecution to question the Petitioner before the Grand Jury based upon such wiretapping, and it was, additionally, illegal for the prosecution to utilize the fruits of such wiretap in a contempt prosecution against Petitioner. *Gelbard* v. *United States*, 408 U.S. 41 (1972), discussed in more detail, *infra*.

B. All Evidence Derived from a Violation of § 605 is Inadmissible At Trials Conducted After the Date of the *Lee* Decision

We respectfully submit that the holding in *People* v. *Feinlowitz*, *supra*, is clearly violative of the mandatory exclusionary rule enunciated in *Lee* v. *Florida*, *supra*.

In *Lee*, this Court made clear that the exclusion of evidence obtained in violation of § 605 is required not merely as a judicially created prophylactic measure, but, rather, is mandated by the laws of the United States which, under Article VI of the United States Constitution are binding upon the States:

> "* * * In [Mapp v. Ohio, 367 U.S. 643], the Court in overruling Wolf [v. Colorado, 338 U.S. 25] imposed a judicially devised exclusionary rule in order to insure that a state could not adopt rules of evidence calculated to permit the invasion of

rights protected by federal organic law. In the present case the federal law itself explicitly protects intercepted communications from divulgence, in a court or any other place.

"But the decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity.' Elkins v. United States, 364 U.S. 206, 222 [footnote omitted] Under our Constitution no court, state or federal, may serve as an accomplice in the wilful transgression of 'the laws of the United States,' laws by which 'the judges in every state [are] bound * * *.' [footnote omitted]

"Finally, our decision today is counselled by experience. The hope that was expressed in Schwartz v. State of Texas that '[e]nforcement of the statutory prohibition in § 605 can be achieved under the penal provisions' of the Communications Act. 344 U.S., at 201 [footnote omitted]. That has proved to be a vain hope. Research has failed to uncover a single reported prosecution of a law enforcement officer for violation of § 605 since the statute was enacted [footnote omitted]. We conclude as we concluded in Elkins [v. United State], 264 U.S. 206s and in Mapp, that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law 'in the only effective available way—by removing the incentive to disregard it.' Elkins v. United States, 364 U.S., at 217."

In *Feinlowitz*, it was concluded that, since Congress had modified the absolute ban of § 605, it had thereby implicitly relaxed the ban with respect to interceptions which occurred prior to the modification. For several reasons, that conclusion will not withstand analysis.

The absolute ban of § 605 was replaced by the following prohibition of 18 U.S.C. § 2515:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any *court, Grand Jury,* department, officer, agency, regulatory body, legislative committee, or other authority of the United States, *a state* or a political subdivision therefore if the disclosure of that information would be in violation of this chapter." [Emphasis added]

Feinlowitz not only read into the new statute a retroactive repeal of § 605, but went on to judicially amend the statute. The rationale of *Feinlowitz* would add a phrase such as the following to § 2515:

> ". . . , unless the interception occurred prior to the effective date of this statute, in which event such evidence or derivative evidence may be received in evidence if the interception was authorized and conducted in substantial compliance with the requirements of this chapter."

We know of no authority for a State court to thus amend an act of Congress. Moreover, the thought that Congress had any such intent is negated by 18 U.S.C. § 3504 [added Pub.L. 91-452, Title VII, § 702(a), Oct. 15, 1970, 84 Stat. 935], which provides as follows:

> "(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States ——
>
> "(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

"(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such alleged unlawful act.

"(b) As used in this section 'unlawful act' means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto."

If Congress were under the impression that § 605 had lost its vitality with regard to wiretapping that had occurred during its effective period, then it would not have spoken in terms of evidence being "inadmissible because . . . of an unlawful act occurring prior to June 19, 1968," the effective date of the new wiretap statute.

As noted *supra*, at p. 10, this Court, in *Fuller*, declared that § 605 should be prospectively applied to subsequent trials even though *Fuller* was decided more than four months after the enactment of the new wiretap statutes. Moreover, in *Kaiser* v. *New York*, 394 U.S. 281, nine months after the enactment of the new wiretap statutes, this Court reaffirmed the prospective exclusionary requirement. It cannot be doubted that this Court was fully aware of the new legislation. Justice Fortas made specific refer-

ence to it in his dissenting opinion, *Desist* v. *United States*, 394 U.S. 244, at 276.

For the above noted reasons, we respectfully submit that this Court should hold, in conformity with its prior ruling, that any evidence derived in violation of § 605, and sought to be utilized in any proceeding after June 17, 1968, must be suppressed, and that any conviction predicated upon such evidence, or derivative evidence must be reversed.

C. A Hearing is Required to Determine Whether the Wiretaps in this Case Substantially Complied with the Requirements of 18 U.S.C. §§ 2510-2519

In *Feinlowitz, supra*, the Court of Appeals, after disposing of the § 605 prohibition, held as follows:

> "The question remains as to whether strict compliance with the provisions of the Safe Streets Act or the newly amended Code of Criminal Procedure is necessary in this case. We think not and hold that in seizures made before the effective date of the Safe Streets Act, substantial compliance with its provisions is all that is required to bring the evidence within the newly-enacted exception in § 605. The crucial fact is that Congress has clearly indicated a policy to allow courtroom use of judicially supervised and controlled wiretaps. Thus, in light of this clearly enunciated policy, it would seem to defeat Congressional intent to require a technical compliance with Chapter 119 of Title 18 of the United States Code since this would result in the virtual inadmissibility of all wiretap evidence obtained before the passage of the act. Consequently, if on such wiretaps there is a clear showing of substantial compliance with the new standards, the evidence will be deemed admissible." (324 N.Y.S. 2d at 69)

While we (along with Judge Burke and Chief Judge Fuld, who dissented) disagree with the reasoning which nullified § 605, it is nevertheless clear that even the modified standard required that a hearing be held to determine whether such "substantial compliance" occurred with regard to the wiretapping in the present case. Since no such hearing was held in this case, the case should have been remanded to the trial court for such a hearing.

D. A Witness May Not Be Prosecuted for Contempt Based upon his Refusal to Answer Questions Derived from Illegal Wiretapping

If wiretapping is illegal, whether under the *Fuller* standard or the *Feinlowitz* standard, then the product of such wiretapping cannot properly be used as a basis for a contempt conviction. In *Gelbard* v. *United States*, 408 U.S. 41 (1972), this Court held that ". . . witnesses may invoke the prohibition of [18 U.S.C.] § 2515 as a defense to contempt charges brought on the basis of their refusal to obey court orders to testify", 408 U.S. at 47.

If the wiretapping in this case was illegal then the use of that wiretapping was twice violative of the statutes involved. First, the fruit of that wiretapping was used to question the Petitioner before the Grand Jury. Then, it was used to persuade the trial jury that the witness had committed contempt. The very use of the recorded questions, including their assertions of fact, before the trial jury violated § 605 (under the *Fuller* rationale) and the Safe Streets Act (under the *Feinlowitz* rationale).

E. Appellant Has Not Waived any Right Secured to Him by the *Gelbard* Decision

The trial proceedings in this case commenced on April 16, 1971 and were concluded that same month. At the outset of the trial, counsel recognized that the New York Court of Appeals' decision in *People* v. *Tomasello*, 21 N.Y.

2d 143, 287 N.Y.S. 2d 1, precluded the argument that a Grand Jury witness was entitled to challenge the questions put to him as having come from a tainted source (A. 132-3). On May 28, 1971, following the conclusion of the instant trial, but before sentence, the United States Court of Appeals for the Third Circuit issued its opinion in the case of *In Re Grand Jury Proceedings, Harrisburg, Pennsylvania* (subtitled *In the Matter of Egan*), 450 F.2d 199 (*en banc*).* In that case, the Court of Appeals held that a Grand Jury witness could not be found in contempt where he has refused to answer questions based on information obtained through allegedly illegal and unconstitutional wiretapping directed against him.

On June 24, 1971, the trial court in the instant case heard Petitioner's motions for the verdict to be set aside Specifically citing the *Egan* case, counsel argued the *Egan* rationale to the court (A. 461-466). The trial court entertained the motion and denied it (A. 471), and then proceeded to sentence Petitioner. It is, thus, clear that Petitioner raised the issue at the earliest reasonable point in the proceedings consistent with the state of the law in New York at the time.

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* The *Egan* case was one of the two cases decided by this Court in *Gelbard* v. *United States*, *supra*, in which the position taken by the Third Circuit was affirmed.

II. Petitioner was deprived of due process of law by the failure of the prosecution, at the time of his appearance before the grand jury, to provide him with the text of his allegedly intercepted telephone conversations as an aid to prompting his recollection of the events with regard to which he was questioned. He was similarly deprived of a fair trial by the denial of his motions for copies of such material so as to enable him to prepare and make his defense at trial.

It is well to note that the Petitioner was not indicted for perjury, although a false claim of non-recollection justifies a perjury indictment under New York law, *People* v. *Doody*, 172 N.Y. 165 (1902).

In claiming that Petitioner's alleged lack of recollection constituted a "refusal . . . to answer [a] legal and proper interrogatory" (P.L. § 600[6]), the prosecution evaded problems of proof and corroboration which would have been required to establish perjury. That evasion fully warrants a particularly critical view of the prosecution's failure, before the Grand Jury, and refusal, at trial, to provide Petitioner with copies of his alleged conversations. One must commence that view with the undestanding of the New York rule that where a fair analysis of all available evidence leaves a reasonable doubt as to whether a defendant truly suffered fallibility of memory, then the defendant must be acquitted, *People* v. *Samuels*, 284 N.Y. 410; *People* v. *Lombardozzi*, 30 N.Y. 2d 677, 332 N.Y.S. 2d 630.

A witness is placed in a most unenviable and difficult position when, during the course of questioning, his interrogator indicates that he possesses a verbatim transcript of a prior, but unguarded, narrative statement by the witness. Few if any human beings can remember, with

precision, what they said in some prior, casual conversation.*

In *Bronston* v. *United States*, 409 U.S. 352, 93 S. Ct. 595, at 600, this Court made clear that the failure of an interrogator to use all reasonable means to assist a reluctant, or even evasive, witness will void a later perjury indictment. In the present case, the prosecutor apparently had in his possession a tape recording and transcript of the conversations about which Petitioner was questioned. By means of extensive paraphrasing and some purported quotation, the witness was alerted to the likelihood that the interrogators had wiretapped his conversations. Nevertheless, no tape was played for him and no transcript was shown to him. He was therefore, directly placed in a most dangerous predicament. In failing to supply the tape or transcripts to Petitioner, the interrogators compounded the appearance that their true purpose was to entrap him into inconsistent statements. It is as likely as not that the Petitioner believed that he did not have a sufficient recollection to warrant a sworn statement as to what had been said in those conversations. While, in another context, not under threat of a perjury charge, an individual might well be willing to freely give his vague recollection, such an attitude cannot be expected of a witness under the instant circumstances. If it were literally true that he did not have a precise recollection, then his responses were proper under the circumstances, *Bronston* v. *United States*, *supra*.

Whatever justification may be imagined for not having disclosed the full verbatim content of the conversations to

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* On the present record, it is not possible to determine whether only part or all of the interrogator's questions herein were derived from electronic surveillance.

the Petitioner before the Grand Jury, must certainly cease to exist with respect to the trial. Prior to and during the trial counsel requested and was denied access to the transcripts in question (A. 132-153, 215-220, 233-242, 34a). He made clear that he wished those transcripts both for the purpose of preparing for trial and for the purpose of demonstrating to the jury that the Petitioner was innocent. Counsel may well have been able to demonstrate to the jury that the prosecutor so inaccurately paraphrased or purportedly quoted from the transcript that it was understandable for Petitioner to be confused to the point of non-recollection. Additionally, defense counsel might have used the transcripts to demonstrate that the comments allegedly made during those conversations were, within context, so insignificant or so equivocal that the witness could not reasonably have been expected to remember them.

The *ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial*, fully supports our contention in this regard. Section 2.1 of those Standards provides, in pertinent part, as follows:

> "2.1 Prosecutor's Obligations
>
> "(a) Except as is otherwise provided as to matters not subject to disclosure (§ 2.6) and protective orders (§ 4.4), the prosecuting attorney shall disclose to defense counsel the following material and information within his possession or control:
>
> * * * * *
>
> "(ii) any written or recorded statements and the substance of any oral statements made by the accused, or made by a co-defendant if the trial is to be a joint one; * * *"

The commentary to §2.1(a)(ii) states as follows:

> *"Meaning of 'statements'*
>
> The term 'statements' is used in subsection (a)(i) and (ii) with reference respectively to prosecution witnesses and to the accused or a co-defendant. The advisory committee intends that the term be given a broad meaning so as to include generally any utterances of the statement-giver which are recorded by any means in whole or in part, and regardless of to whom they were made—whether a prosecuting attorney, an investigator, a Grand Jury [see subsection (a)(iii)], or anyone else. *It is also intended that statements be discoverable regardless of how they are obtained, whether surreptitiously or voluntarily.*" (*Id.* at pp. 61-62) [emphasis added.]

The view taken by the *ABA Standards*, *supra*, was adopted by the United States Court of Appeals for the Second Circuit in *United States* v. *Crisona*, 416 F.2d 107, 114-115 (2nd Cir., 1969).

Without access to the wiretap materials, Petitioner was completely deprived of any opportunity to make a defense, and the jury was deprived of an opportunity to fully assess the context in which Petitioner allegedly falsely claimed a lack of recollection. For that reason, we submit, he was deprived of a fair trial.

III. Having improperly denied the defense access to the wiretap transcripts, the prosecutor violated Petitioner's Sixth Amendment rights by arguing to the jury that an extract which had been purportedly read to Petitioner before the grand jury was, in fact, an accurate version of a conversation in which Petitioner had allegedly participated.

The prosecutor, an experienced trial lawyer, made improper and unfair comment in his summation in violation of the Petitioner's right to be confronted by the evidence against him and to have an opportunity to test the truth of that evidence.

There was no evidence offered at trial to establish that Petitioner had, in fact, participated in any of the conversations or meetings indicated by the questions which had been put to him before the Grand Jury. Reliance was placed solely upon the content of the Grand Jury minutes. However, in summation, the prosecutor improperly argued:

> "* * * I want to show you specifically that every effort was made to refresh this witness' recollection and that not only was he selective in what he chose to tell the Grand Jury but that the selectivity of his memory is patently demonstrated on the basis of his responses after Mr. McKenna read him what purported to be——
>
> "[Defense counsel]: I object to that.
>
> [Prosecutor]: — what purports to be a verbatim account of that conversation." (A. 305)

The court thereupon sustained a defense objection to the comment, and directed the jury to disregard it (A. 306). Nevertheless, after quoting a portion of the Grand Jury minutes, the prosecutor again argued:

"Now, ladies and gentlemen, I submit to you that this record, that particular reference to the record, where this witness was given in effect a verbatim account of the conversation—

"[Defense counsel]: I object to that, your Honor.

"The Court: Overruled. The question has included certain words and quotes. *The quotes mean a verbatim conversation.*

"The objection is overruled." (A. 308)

By reversing itself, the court not only ruled improperly, but lent its own integrity and veracity to the prosecutor's improper remarks. It was thereby established for the jury, without the benefit of any foundation, that the assertive questioning by the prosecutors in the Grand Jury was based on actual fact. It is fundamental that counsel's assertions of facts not proven amount to unsworn testimony, and are grossly improper. In his concurring opinion, in which the other two members of the panel also concurred, in *United States* v. *DeAngelis*, 490 F.2d 1004 (2d Cir., 1974), Circuit Judge Mansfield recently roundly condemned such tactics. See, particularly, cases cited at p. 1011. See also, *ABA Standards Relating to the Prosecution and Defense Functions*, § 5.8 (approved draft, 1970).

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari ought be granted.

Respectfully submitted,

MAURICE EDELBAUM
HENRY J. BOITEL
Attorneys for Petitioner

May, 1975

APPENDIX

APPENDIX A

Remittatur of the Court of Appeals

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 17th day of January in the year of our Lord one thousand nine hundred and seventy-five, before the Judges of said Court.

Witness,

The Hon. Charles D. Breitel,
Chief Judge, *Presiding.*

Joseph W. Bellacosa, Clerk.

THE PEOPLE &C.,

Respondent,

VS.

MATTHEW IANNIELLO,

Appellant.

BE IT REMEMBERED, That on the 6th day of June in the year of our Lord one thousand nine hundred and seventy four Matthew Ianniello, the appellant in this cause, came here unto the Court of Appeals, by Maurice Edelbaum, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and

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for the First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Richard H. Kuh, D. A., New York County.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Edelbaum, of counsel for the appellant, and by Mr. Jonathan Lovett, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed. Opinion by Breitel, Ch. J. All concur.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order is affirmed, &c., AS AFORESAID.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

JOSEPH W. BELLACOSA
Clerk of the Court of Appeals
of the State of New York

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COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, February 20, 1975.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL] JOSEPH W. BELLACOSA

APPENDIX B

Opinion of the New York Court of Appeals

People v. *Ianniello*, 36 N.Y.2d 137, 365 N.Y.S.2d 821

(February 20, 1975)

STATE OF NEW YORK COURT OF APPEALS

1 No. 73

THE PEOPLE &C.,

Respondent,

vs.

MATTHEW IANNIELLO,

Appellant.

BREITEL, *Ch. J.*:

Defendant-appellant was convicted, after a jury trial, on three counts of criminal contempt (former Penal Law § 600, subd. 6). He was sentenced to a suspended one-year prison term on one count, and a $500 fine on each of the three counts. The Appellate Division affirmed.

Only one issued raised merits discussion, namely, whether the legality and propriety of questions put to defendant as a grand jury witness was a question of fact to be submitted as such in the court's charge to the jury.

There should be an affirmance. Although, under the statute, the crime of contempt by a witness depends upon "legal and proper" questions having been put to him, whether they were legal and proper is a question of law.

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The salient facts are briefly stated (for the detailed facts, see *People* v. *Ianniello*, 21 N Y 2d 418, 421-422, cert. den. 393 U.S. 827). Defendant, owner of "two licensed bars and grills" in midtown Manhattan, was called to testify before the grand jury on June 11, 1964. The grand jury was conducting an extensive investigation of a bribery conspiracy involving police and officials of the State Liquor Authority. Defendant was questioned about several conversations with a friend, Benny Cohen, and one with a police sergeant, concerning an investigation of Cohen. Defendant, after some wrangling with the examining prosecutor over his requests to see his lawyers, finally testified that he could not recall the conversations. Returning to the grand jury on June 18, 1964, defendant professed inability to remember other alleged conversations.

Defendant's purported inability to recall the conversations formed the basis of his indictment on four counts of criminal contempt. Supreme Court, New York County, dismissed the indictment, on the ground that defendant had been denied his right to counsel when he was refused permission to leave the room to discuss the propriety of a question with his lawyer. The Appellate Division affirmed, without reaching the counsel issue, on the ground that defendant as a "target" of the inquiry was immune from prosecution for contempt. This Court reversed, and reinstated the indictment, holding that defendant was subject to prosecution for criminal contempt for evasive testimony before the grand jury whether or not he was a possible defendant. It was also held, after detailing a grand jury's witness' right to counsel, that, in fact, defendant had not been deprived of any right to consult with his lawyer (*People* v. *Ianniello*, 21 N Y 2d 418, 421, 424-425, cert. den. 393 U.S. 827, *supra*).

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At trial, before summation, the court presented to counsel portions of its proposed charge apparently in an effort to provide the defense with a fair opportunity to submit requests. As it did so, the court stated that the Court of Appeals, in the first *Ianniello* case, had held that the questions asked defendant were legally and properly put. Therefore, the court informed defense counsel, it was going to charge that the legality and propriety of the questions had been established as a matter of law. Defense counsel did not, at this time, object to the proposed charge. Shortly thereafter, the court repeated its intention to charge that the questions were legal and proper, as a matter of law, and defense counsel agreed.

When the court, however, charged the jury that the questions put to defendant were, as a matter of law, legal and proper, defense counsel took exception. After expressing surprise, the court refused to alter its charge.

Defendant was convicted of three of the four contempt charges, the only counts submitted to the jury. The Appellate Division unanimously affirmed.

On this appeal, defendant contends that the court erroneously charged that the legality and propriety of the questions put to defendant had been established as a matter of law by this Court's opinion in the first appeal. Since whether questions put to a witness are legal and proper is a question of law, it is not necessary to decide whether the trial court correctly determined that it was bound by the Court's reasoning on the prior appeal.

Section 600 (subd. 6) of the former Penal Law provides that "contumacious and unlawful refusal . . . to answer any legal and proper interrogatory" constitutes criminal contempt (see Penal Law, § 215.51 ["a person

is guilty of criminal contempt in the first degree . . . when after having been sworn as a witness, before a grand jury, he refuses to answer any legal and proper interrogatory"]). To be guilty of contempt the witness need not flatly refuse to answer the questions put to him; false and evasive profession of an inability to recall, which amounts to no answer at all, is punishable as criminal contempt (see *People ex rel. Valenti* v. *McCloskey*, 6 NY 2d 390, 398, app. dismd. 361 U.S. 354; *Matter of Finkel* v. *McCook*, 247 App. Div. 57, 62, affd. 271 N.Y. 636).

The province of the court is to determine questions of law; the province of the jury is to decide questions of fact (*People* v. *Walker*, 198 N.Y. 329, 334-335; see, generally, 9 Wigmore on Evidence, § 2549, *et seq.*; Richardson on Evidence [10th ed.], § 114, *et seq.*; Thayer, Preliminary Treatise on Evidence, pp. 183-262). Application of this venerable principle, however, is but the ultimate step in the resolution of problems arising out of the division of functions between judge and jury. The threshold inquiry which must be made is, of course, whether a particular issue is one of law or fact.

In *People* v. *Walker* (*supra*), this Court stated that "every essential element of a crime presents a question of fact, whether there is any conflict in the evidence or not" (198 N.Y. at 334). Of course, this is an accurate, although not meticulous, statement of the broad rule applicable in criminal cases, because as the Court noted in the *Walker* case, on the criminal side a verdict of guilty may never be directed, and a jury has the power to reject undisputed facts (or nonfactual elements, for that matter) constituting the crime (see, also, *People* v. *Mussenden*, 308 N.Y. 558, 563). Nevertheless, the rule may not be parroted or applied simplistically, as the ensuing discussion will endeavor to show.

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Certain offenses, grouped under the general statutory headings of "perjury" and "other offenses relating to judicial and other proceedings", contain an element involving materiality, legality or propriety (Penal Law, §§ 210.10 [perjury in the second degree]; 210.15 [perjury in the first degree]; 210.40 [making an apparently sworn false statement in the first degree]; 215.50 [criminal contempt in the second degree]; 215.51 [criminal contempt in the first degree]; 215.60 [criminal contempt of the legislature]; see *People* v. *Teal*, 196 N.Y. 372, 376; *People ex rel. Hegeman* v. *Corrigan*, 195 N.Y. 1, 9; *People* v. *Sharp*, 107 N.Y. 427, 456; *Wood* v. *People*, 59 N.Y. 117, 121-122; *Tuttle* v. *People*, 36 N.Y. 431, 435; see, generally, Denzer & McQuillan, Practice Commentary to Penal Law § 210.15, 39 McKinney's Consol. Laws of N.Y., at pp. 696-699; Law Revision Commission Reports, 1939 Legis. Doc. No. 65[G], 1935 Legis. Doc. No. 60[F]. In each of these instances, the statute requires either that false statements made by a witness be "material to the action, proceeding or matter involved", or that questions put to a witness be "legal and proper" or "material and proper". Thus, applying the general rule, if materiality or legality and propriety raise questions of fact, they must be charged as such to the jury; if they raise questions of law, they are for the court to resolve.

In considering the issue, because of the close analogy, it is appropriate to discuss the rules applicable to materiality as an element in the crime of perjury (cf., Cal. Penal Code, § 166, subd. 6 [questions put to witness must be "material" to support criminal contempt charge]).

In *People ex rel. Hegeman* v. *Corrigan* (195 N.Y. 1, *supra*) it was held long ago that "[w]hether in a prosecution for perjury the testimony, the falsity of which is

charged, is material or not is a question of law for the court [citations omitted]." However, a 1935 statutory revision split perjury into a two-degree crime, the degree depending upon whether the false testimony was related to a material matter. Thereafter, despite the clear ruling of this Court in the *Hegeman* case (*supra*), and overwhelming contemporary authority to the contrary, it was held that materiality is a question of fact for the jury to decide (*People* v. *Clemente*, 285 App. Div. 258, 262, affd. no opn. 309 N.Y. 890).

The New York cases, perforce, continue to follow the *Clemente* rule (see, e.g., *People* v. *Dunleavy*, 41 A D 2d 717, affd. 33 N Y 2d 573; *People* v. *Perna*, 20 A D 2d 323, 326-327; *People* v. *Dodge* 12 A D 2d 353, 360; cf; Temporary State Comm'n on Revision of the Penal Law and Criminal Code, Comm'n Staff Notes at pp. 374-375 [no treatment of the issue]). In other jurisdictions, this is the accepted rule only in Georgia and Louisiana (see *Cox* v. *State*, 13 Ga. App. 687; *State* v. *Spencer*, 45 La. Ann. 1, 11-12; see, also, Lillich, The Element of Materiality in the Federal Crime of Perjury, 35 Indiana L. Rev. 1, 9-14, in support of the *Clemente* rule). The remaining jurisdictions which have considered the issue hold that materiality is a question of law to be decided by the Court (see, e.g., *United States* v. *Jones*, 374 F. 2d 414, 419 [2d Cir.], cert. den. 389 U.S. 835; *United States* v. *Siegel*, 263 F. 2d 530, 533 [2d Cir.] [Hand, J.], cert. den. 359 U.S. 1012; *People* v. *Pierce*, 66 Cal. 2d 53, 61; *Wilkinson* v. *State*, 226 Ill. 135, 147; *Wolfe* v. *State*, 271 So. 2d 132, 133 [Fla.]; *State* v. *Deets*, 195 N.W. 2d 118, 122 [Iowa]; *Brewer* v. *State*, 233 So. 2d 779, 781-782 [Miss.]; see, generally, Ann., Perjury — Materiality — Fact or Law, 62 ALR 2d 1027-1036; A.L.I., Model Penal Code, Proposed Official Draft, § 241.1, subd. 2; Model Penal Code [T.D. No. 6], Commentary to § 208.-20, at pp. 113-115).

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The New York rule as to perjury should not be applied to other crimes, however close the analogy. Cases involving criminal contempt and not perjury, which have considered whether the legality and propriety of interrogations put to a witness before a grand jury constitutes a question of law or fact, have understandably relied upon reasoning similar to the perjury rationale of *Clemente* to hold that it is a question of fact for the jury. They are, however, not persuasive to justify applying the *Clemente* rationale to contempt cases (see *People* v. *McAdoo*, 45 Misc. 2d 664, 668, affd. 51 Misc. 2d 263, cert. den. 386 U.S. 1031; *People* v. *Amarante*, 100 N.Y.S. 2d 677, 679, 681).

Moreover, analysis of the terms used in the contempt statute supports the view that the legality and propriety of questions asked of a witness is a question of law. Indeed, the statutory use of the word "legal" makes particularly incongruous and self-contradictory a treatment of the standard as one of fact. In *People* v. *Ianniello* (21 N Y 2d 418, cert. den. 393 U.S. 827, *supra*), "proper" questions were described as those pertinent and relevant to the scope of the grand jury's investigation (*id.* at 426). "Legal" questions are those which are "proper", and which do not contravene any testimonial privilege of the witness of his privilege against self-incrimination (see, *id*, at 424-425; see, also, *Matter of Barnes*, 204 N.Y. 108, 125; *People* v. *McAdoo*, 45 Misc. 2d 664, 667, affd. 51 Misc. 2d 263, cert. den. 386 U.S. 1031, *supra*). "Legal" could also refer to questions concededly not based upon tainting illegal sources (see, e.g., U.S. Code, tit. 18, § 2515; *People* v. *Einhorn*, — N Y 2d —). Thus, it is inescapable from the foregoing logical and legal distinctions that whether a question is "legal and proper" is particularly a "law question" for a court within its

scope and upon which it has a duty to charge the jury (see *Sinclair* v. *United States*, 279 U.S. 263, 298).

The language in the *Sinclair* case is particularly useful. There it was said in discussing contempt:

> "The question of pertinency . . . was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law. Greenleaf on Evidence (13th ed.) § 49. Wigmore on Evidence, §§ 2549, 2550. And the materiality of what is falsely sworn, when an element in the crime of perjury is one for the court. *Carroll* v. *United States*, 16 F. (2d) 948, 950. *United States* v. *Singleton*, 54 Fed. 488. *Cothran* v. *State*, 39 Miss. 541, 547." (*Id.* at 298.)

Although as a question of law the trial court determines the legality and propriety of questions put to a witness charged with contempt, it should charge the jury on that element as it does on any other question of law. True, the jury may refuse to return a verdict of guilty, even perversely, as it may in any criminal case, even where all the facts and the law are undisputed (see *People* v. *Walker*, 198 N.Y. 329, 335, *supra*). This does not mean, however, that the jury should be charged that it is free to disregard the court's instruction on this question of law, anymore than on any other question of law.

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Of course, where a jury for constitutional reasons is given the ultimate power to decide a question of law the law explicitly so provides (see N.Y. Const., art. I, § 8; former Code Crim. Pro., § 418; *People* v. *Sherlock*, 166 N.Y. 180, 184).

The only reason for difficulty in the past has been an inadequate analysis. It was assumed, illogically, on an overreading of the *Walker* case (*supra*), it is suggested, that because the jury has the final say in a criminal case before guilt may be found, a question of law must be tortured into being characterized as a question of fact and submitted to the jury as if it were, what it is not, a question of fact.

Accordingly, the order of the Appellate Division should be affirmed.

* * * * *

Order affirmed. Opinion by Breitel, Ch. J. All concur.

APPENDIX C

Prior Opinion of the New York Court of Appeals

People v. *Ianniello*, 21 N.Y.2d 418, 288 N.Y.S.2d 462 (February 21, 1968)

The PEOPLE of the State of New York, Appellant, v. MATTHEW IANNIELLO, Respondent.

Court of Appeals of New York.

Feb. 21, 1968.

William Sonenshine, Brooklyn, and Maurice Edelbaum, New York City, for respondent.

BREITEL, Judge.

The People appeal from the dismissal of an indictment for criminal contempt under subdivision 6 of section 600 of the former Penal Law. The indictment in separate counts charged four violations of the statute, based upon defendant's allegedly evasive, equivocal, and false responses to questions asked of him in two appearances before the New York County Grand Jury on June 11 and June 18, 1964. The Supreme Court, New York County, dismissed the indictment on the ground that defendant, while testifying as a witness before the Grand Jury, was denied the right to counsel when he was refused permission to leave the Grand Jury room to discuss the propriety of a question with his lawyer. The Appellate Division, by a divided court, affirmed without reaching the counsel issue on the ground that defendant was immune from prosecution for contempt since he was a "target" of the inquiry. Two Justices, in dissent, disputed defendant's status as a target, and also concluded that under the circumstances in which defendant sought

"advice," the refusal to permit defendant to consult with his lawyer did not amount to an improper interference with the right to counsel.

The order should be reversed and the indictment reinstated. Under the rule in People v. Tomasello, 21 N.Y. 2d 143, 287 N.Y.S.2d 1, 234 N.E.2d 190, infra, this defendant is subject to prosecution for criminal contempt for evasive testimony before the Grand Jury whether or not he was a possible defendant. Nor was he in fact deprived of any right to consult with his lawyer, although in a proper case a Grand Jury witness has such right.

Defendant, owner of "two licensed bars and grills" in the sensitive mid-town area, was called before the Grand Jury on June 11, 1964. At the outset, he refused to be sworn on the ground that he was a defendant in a pending misdemeanor prosecution. He was then told by an assistant district attorney that he was called "solely in the role of a witness" in the Grand Jury's investigation of a bribery conspiracy involving police and officials of the State Liquor Authority. After he was told by the prosecutor, before the Grand Jury, that the "grand jury is ready to confer immunity upon you should you consider any answers that you might have to give [incriminatory]," and after he had said that he understood the nature of this advice, he consented to being sworn. Defendant was thereafter questioned about conversations concerning investigations of police payoffs, which he allegedly had had with one Benny Cohen in 1963. When he stated that he could not recall such conversations, he was reminded that the Grand Jury had "voted to confer immunity" upon him, and that he was legally obligated to give truthful testimony. Pressed to affirm or deny that the conversations had taken place, defendant asked: "Could I excuse myself to see my attorney for a minute?

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* * * I want to ask him if it's a proper question." This request was denied and, after defendant persisted in his request, the prosecutor suggested that they "go in open court * * * and make an application." This course was not pursued, however. Instead, the Grand Jury foreman, at the prosecutor's request, directed the witness to answer. He thereupon answered that he did not recall the conversations.

The questioning then turned to the subject of defendant's alleged meeting in September, 1963 with one O'Shea, a police sergeant. Although the conversation allegedly involved a confidential investigation pending against defendant's friend, Benny Cohen, defendant persisted in stating that he did not "recall" the conversation and could not affirm or deny that it had ever occurred. This testimony was the basis for one of the four contempt charges in the indictment.

The other three counts of the indictment dealt with testimony given when defendant was recalled, a week later, on June 18, 1964. They too involved defendant's purported inability to recall conversations in the recent past. Thus, defendant stated that he could not recall whether anyone had, within the previous six months, told him to stay away from Sergeant O'Shea because the officer was under investigation. Nor could he recall having entertained police officers, other than a police captain, at his farm.

The basis for the Appellate Division's opinion—the immunity enjoyed by a prospective defendant or target of investigation from prosecution for contempt on the basis of his Grand Jury testimony—was recently undermined by this court in People v. Tomasello, 21 N.Y.2d 143, 287 N.Y.S.2d 1, 234 N.E.2d 190, supra. In the *Tomasello*

case, the court held that a Grand Jury witness who is a possible defendant or target and who has not received transactional immunity for a previously committed substantive offense under section 2447 of the former Penal Law could nevertheless be prosecuted for perjury on the basis of his current testimony. The court reasoned that such a witness enjoys the benefits of an exclusionary rule, often referred to as an "immunity," forbidding use of his compelled statements and any derivative evidence ("fruits") in a prosecution for a previously committed substantive crime. It held, therefore, that he is not also endowed " 'with a license to commit perjury.' " Of course, this reasoning extends as well to prosecutions for contempt committed before the Grand Jury, particularly when (as here) the contempt involves answers "so false and evasive as to be equivalent to no answer at all" (People ex rel. Valenti v. McCloskey, 6 N.Y.2d 390, 398, 189 N.Y.S.2d 898, 903, 160 N.E.2d 647, 651). The "use" of testimony to establish contempt or perjury, where the current testimony itself constitutes the contempt or perjury, has been contrasted with the use of testimony to establish commission of a prior, substantive offense (8 Wigmore, Evidence [McNaughton rev. ed.], § 2282, pp. 511-512, cited in People v. Tomasello, supra; former Penal Law § 2447, subd. 2). Hence, even if defendant Ianniello was a target of the investigation, under the reasoning of *Tomasello* case, he may nevertheless be punished for contempt for his delinquency in testifying. When a witness is not a target, of course, the propriety of subjecting him to the contempt sanction has never been questioned.

This case also raises a novel question concerning the existence and scope of the Grand Jury witness' right to consult with counsel. It is, of course, a familiar proposition that the lawyer for a witness is not entitled to be present in the Grand Jury room (see, e.g., Anonymous

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Nos. 6 and 7 v. Baker, 360 U.S. 287, 292, 79 S.Ct. 1157, 3 L.Ed.2d 1234; Matter of Groban, 352 U.S. 330, 333, 77 S.Ct. 510, 1 L.Ed.2d 376; United States v. Scully, 2 Cir., 225 F.2d 113, 115-116, cert. den. 350 U.S. 897, 76 S.Ct. 156, 100 L.Ed. 788; Matter of Black, 2 Cir., 47 F.2d 542, 543; cf. People ex rel. McDonald v. Keeler, 99 N.Y. 463, 484-485, 2 N.E. 615, 625-627; Matter of Anonymous v. Arkwright, 5 A.D.2d 790, 791, 170 N.Y.S. 2d 535, 536, mot. for lv. to app. den. 4 N.Y.2d 676, 173 N.Y.S.2d 1025). This rule rests upon the statutory exclusion of all except certain authorized persons before the Grand Jury and the need to preserve the secrecy of Grand Jury proceedings (Code Crim. Proc., §§ 255-259). There remains, however, the further question whether the witness should not be entitled to leave the Grand Jury room to consult with his lawyer (see United States v. Leighton, D.C., 265 F.Supp. 27, 38; United States v. Kane, D.C., 243 F.Supp. 746; United States v. Grunewald, D.C., 164 F.Supp. 640, all indicating that the procedure in the Southern District of New York is to exclude the lawyer but to permit the witness to leave the Grand Jury room and consult with him; this is also done in State Grand Jury proceedings [see, e.g. People v. De Feo, 284 App. Div. 622, 627, 131 N.Y.S.2d 806, 812, revd. on other grounds 308 N.Y. 595, 127 N.E.2d 592]). Such conduct by the witness does not violate the statutory policy of secrecy, for it has always been understood that the witness is at all times free to discuss his testimony outside the Grand Jury room. Whether and to what extent the witness ought to have a right to consult with his lawyer depends upon an analysis of the proper role of counsel in these circumstances, and the need to avoid procedural strictures which would impair the effectiveness of Grand Jury investigation.

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Since a Grand Jury proceeding is properly an investigation rather than a prosecution directed against the witness, the witness has no right to be "represented" by counsel, in the technical sense (see, e. g., Matter of Groban, 352 U.S. 330, 332-333, 77 S.Ct. 510, 1 L.Ed.2d 376, supra). However, in light of current recognition of the importance of counsel in providing effective notice of rights, it is difficult to maintain that the witness is not entitled to the advice of his lawyer (cf. Miranda v. State of Arizona, 384 U.S. 436, 475, 86 S.Ct. 1602, 16 L.Ed.2d 694; Escobedo v. State of Illinois, 378 U.S. 478, 486, 84 S.Ct. 1758, 12 L.Ed. 977; People v. Donovan, 13 N.Y.2d 148, 153, 243 N.Y.S.2d 841, 844, 193 N.E.2d 628, 630). As a matter of fairness, government ought not compel individuals to make binding decisions concerning their legal rights in the enforced absence of counsel (see Matter of Conlon v. Murphy, 24 A.D.2d 737, 263 N.Y.S.2d 360 [patrolman could not be dismissed, without notice or hearing, on the basis of his refusal to give further Grand Jury testimony, after he had asked for and been denied an opportunity to consult counsel]). Courts have a particular responsibility to prevent unfairness in Grand Jury proceedings, for the Grand Jury is an "arm of the court" (see, e.g., Matter of Spector v. Allen, 281 N.Y. 251, 260, 22 N.E.2d 360, 364; People v. Pisanti, 179 Misc. 308, 309, 38 N.Y.S.2d 850, 851).

The legal rights which may be critically affected before the Grand Jury, and concerning which the witness should be entitled to consult with his lawyer, are several. First, the witness may be put in a position of determining whether to assert or waive his privilege against self incrimination. When the witness is a "target" of the investigation, his statements and any evidence derived from them ("fruits") cannot be used in a prosecution

against him for a previous substantive offense unless he expressly waives the privilege (People v. Steuding, 6 N.Y.2d 214 189 N.Y.S.2d 166, 160 N.E.2d 468). Even he, however, must make a legally significant choice in answering or claiming his privilege; unless he claims his privilege he does not receive transactional immunity under section 2447 of the former Penal Law. The witness who is not a target of the inquiry faces an even more critical decision for, unless he claims his privilege and thereby invokes immunity, his statements can be used against him substantively. Faced with a confusing variety of rules concerning the existence and scope of his privileges, a witness should not be required to make these choices unaided by his lawyer.

A second legal right which may be affected before the Grand Jury is the witness' right to refuse to answer questions having no bearing on the subject of the investigation (see Matter of Koota v. Colombo, 17 N.Y.2d 147, 150, 269 N.Y.S.2d 393, 394, 216 N.E.2d 568). To prevent unwarranted intrusion into the witness' privacy, he ought to be allowed to consult with his lawyer concerning the propriety of Grand Jury questioning. Finally, where a question may involve a testimonial privilege enjoyed by the witness or to which he may be subject—for example, between attorney and client, doctor and patient or husband and wife—the witness should be permitted to consult with counsel.

Whenever a witness demands to see his lawyer for counselling concerning his legal rights (as opposed to mere strategic advice), he should be given an opportunity to do so. If his right is denied, however, he does not have license to commit perjury or contempt. Rather, he must persist in his refusal to answer, thus forcing the prosecutor to take the matter into open court for a

ruling. By requiring the matter to be taken to the presiding Justice, the proceeding is expedited and the danger of stalling tactics reduced. The judge can rule on questions of pertinency, after argument of counsel. He can determine whether a colorable claim of testimonial privilege is presented, and can inform the defendant of the extent of his immunity from prosecution for prior offenses. Where a witness persists in raising objections which are palpably not in good faith, the judge may compel him to desist from this course under the sanction of contempt proceedings.

This procedure was not followed here. Instead, defendant undertook to answer the prosecutor's questions, albeit in an evasive manner. If the instant record left any room for the possibility that defendant in fact needed legal counsel or, in good faith, asked for aid of counsel in a proper matter (as opposed to strategic advice in answering questions), affirmance would be required in the interests of fairness. The record, however, makes it abundantly clear that the aid of counsel was not required, and that defendant with full awareness was seeking help only in answering questions he found embarrassing. Defendant's request for his lawyer's advice was limited to whether the question put to him was "proper." Yet, the pertinence, indeed the relevance, of the question was never really in issue: it dealt with an alleged conversation concerning police payoffs, and defendant had been told initially that the purpose of the Grand Jury investigation was to "determine if there was in existence a conspiracy to bribe or give unlawful fees to public officials of the City of New York, to wit, the Police Department". He never raised any doubt as to the scope of the inquiry.

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Defendant did not request advice concerning any testimonial privileges, or his privilege against self incrimination, or the obtaining of transactional immunity. Indeed, he had been repeatedly told that the Grand Jury was interested in him only as a witness, and that it was prepared to confer immunity upon him.

Finally, three of the contempt counts refer to testimony given after a week's recess, during which defendant had extended opportunity to consult with his lawyer and undoubtedly did so, and hence are free of taint. The appearance before the Grand Jury a week after the first meeting is critically important. By that time defendant had the fullest opportunity to consult with counsel. Actually, the only area in which he still needed proper lawful advice was with respect to his status as a witness given transactional immunity. The Grand Jury was still insisting unequivocally that it was giving him immunity or was ready to do so, and there was no assertion by anyone or implication from anything that he had waived any rights to his privilege against self incrimination or that he was not entitled to the fullest immunity allowed by the statute. His conduct on his second appearance before the Grand Jury, therefore, presents no difficulty in assessing it as contemptuous and is highly persuasive in confirming that his purpose in asking to speak with his lawyer on the first occasion was specious and without legal basis.

It should be noted in passing that defendant argues that he had not obtained full transactional immunity under section 2447 of the former Penal Law, although it is all but impossible that he could or would be prosecuted for a substantive offense after the repeated assurances given to him by officials authorized to confer immunity under an enabling statute. True, to obtain full immunity

under section 2447, the witness must "refuse to answer a *particular question*" on grounds of privilege, and then answer the question when ordered to do so by the Grand Jury (People v. Laino, 10 N.Y.2d 161, 173-174, 218 N.Y.S.2d 647, 658, 176 N.E.2d 571, 579; emphasis in original). Defendant Ianniello never literally refused to answer a specific question on the ground of privilege at any one time, but he made it patent that he would not be sworn or answer questions unless he was given immunity, calling attention to the fact that there was a criminal action pending against him. After he was told that he would have full immunity he was sworn and purported to answer the questions put to him. Later when he refused to answer some questions, he was directed to do so. All the conditions referred to in the *Laino* case (supra) were thus satisfied. The only thing absent is the literal mouthing of the traditional words in claiming the privilege against self incrimination. Even if, and it is difficult to conceive, defendant did not obtain transactional immunity, however, it is of no relevance to his right-to-counsel claim. Defendant's request for counsel did not relate to an issue of self incrimination, but only to one of pertinency. The record indicates that there was no bona fide issue as to the pertinency of the question and, therefore, no need to consult with counsel on that issue.

Defendant finally contends that the "evidence adduced before the Grand Jury was insufficient in law to have warranted the finding of the indictment." This contention is without merit. Defendant's answers before the Grand Jury, dealing with significant conversations in the recent past, could be found evasive by a jury. Consequently, they may well come within the rule that contempt is committed when a defendant's responsive is "so false and evasive as to be equivalent to no answer

at all" (People ex rel. Valenti v. McCloskey, 6 N.Y.2d 390, 398, 189 N.Y.S.2d 898, 903, 160 N.E.2d 647, 651, supra).

Accordingly, the order of the Appellate Division should be reversed and the indictment reinstated.

FULD, C. J., and BURKE, SCILEPPI, BERGAN, KEATING and JASEN, JJ., concur.

Order reversed, etc.

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People v. *Ianniello*, 27 A.D.2d 504, 280 N.Y.S.2d 852 (June 15, 1967)

The PEOPLE of the State of New York, Appellant, v.

Matthew IANNIELLO Defendant-Respondent.

Supreme Court, Appellate Division, First Department

June 15, 1967.

William Sonenshine, Brooklyn, of counsel (Maurice Edelbaum, New York City, and Evseroff, Newman & Sonenshine, Brooklyn, attorneys), for respondent.

H. Richard Uviller, New York City, of counsel (Frederick P. Hafetz, New York City, with him on the brief; Frank S. Hogan, Dist. Atty.) for appellant.

Before BOTEIN, P.J., and EAGER, STEUR, RABIN, and McGIVERN, JJ.

PER CURIAM:

Defendant was called to testify before a grand jury investigating the alleged existence of a conspiracy to bribe public officers. Having given answers allegedly evasive, equivocal and false, he was indicted for criminal contempt, charged with contumacious and unlawful refusal to answer legal and proper interrogatories (Penal Law, § 600, subd. 6). The present appeal is by the People from an order which dismissed the indictment on the ground that the impugned answers were given after defendant had been denied access to his counsel who was

outside the grand jury room. While we agree that the indictment is subject to dismissal, in our view it is unnecessary to reach the issue of defendant's right to consult counsel, nor need we consider whether defendant's response to the grand jury's questioning was "so false and evasive as to be equivalent to no answer at all" (People ex rel. Valenti v. McCloskey, 6 N.Y.2d 390, 398, 189 N.Y.S.2d 898, 903, 160 N.E.2d 647, 650).

Each count on the indictment alleges that defendant "was further informed that said Grand Jury had voted to confer immunity upon him from prosecution for any crimes that might be revealed by his testimony." The theory of the indictment, then, is that, having been granted immunity, defendant was bound to testify. The record however, does not show that the grand jury had voted to grant him immunity, or that the conditions precedent to such a grant had been fulfilled. For example, defendant did not affirmatively claim his privilege (see People v. Laino, 10 N.Y.2d 161, 172, 218 N.Y.S.2d 647, 656, 176 N.E.2d 571, 578). The People's brief acknowledges that what happened before the grand jury fell short of "an operative conferral of statutory immunity." An essential premise of the indictment cannot be proven; therefore, the indictment may not be sustained.

Furthermore it is questionable that the grand jury could constitute defendant a "witness" so that he may be deemed to have waived his privilege by not claiming it. The witnesses referred to in section 2447 of the Penal Law are persons "who are, in truth and fact, witnesses" (People v. Steuding, 6 N.Y.2d 214, 217, 189 N.Y.S.2d 166, 168, 160 N.E.2d 468, 470). This defendant, before he was subpoenaed, was known or suspected to have been an active participant in the briberies under investigation. In fact, the present indictment alleges that in the course of the grand jury investigation

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> "* * * it became material and necessary to examine the defendant to inquire and ascertain whether a certain police sergeant of the Police Department of the City of New York had been receiving bribes from the defendant to allow the defendant to conduct his businesses, licensed bars and grills, in violation of the Penal Law and the Alcoholic Beverage Control Law of the State of New York * * *."

Thus, we conclude he was not a witness in the statutory sense. He was a prospective defendant or one who is a target of an investigation (People v. Steuding, 6 N.Y.2d, supra, 216, 217, 189 N.Y.S.2d 167, 160 N.E.2d 469).

Dismissal of the indictment is required, and the order entered June 22, 1966, granting defendant's motion to dismiss should be affirmed.

Order entered on June 22, 1966, affirmed.

All concur except STEUER and BENJAMIN J. RABIN, JJ., who dissent in an opinion by STEUER, J.

STEUER, Justice (dissenting):

The People appeal from the dismissal of an indictment containing four counts for criminal contempt. Although the court below based decision on a single ground, we will discuss all three grounds advanced by the defendant.

The first ground is that there was insufficient evidence for the finding of the indictment. The four counts are based on the answers to four series of questions addressed to defendant while testifying before the grand jury. The questions referred to defendant's meetings and conversa-

tions had with certain police officers. As to all of these defendant answered that he did not remember. While it is doubtless true that presence or absence of recollection can never be categorically established, the circumstances may be such as to establish beyond a reasonable doubt that the professed lack of recollection is sham. The charge in the first count is that defendant answered that he did not recall whether in the past two weeks anyone had advised him to keep away from certain police officers. In the second and third counts it is stated that, after testifying that some police officers had been visitors at his farm, he could not recall the names of any of the officers except one. The fourth count concerns a meeting with a certain police sergeant which defendant admitted took place but defendant denied recollection whether the subject of a police investigation was mentioned. None of these incidents was so remote in time that recollection had faded. Rather it was asserted that the matters were so insignificant that they could not be recalled. These answers could well be found to be so evasive as to amount to a refusal to answer, and so contemptuous (People ex rel. Valenti v. McCloskey, 6 N.Y.2d 390, 398, 189 (N.Y.S. 2d 898, 903, 160 N.E.2d 647, 650).

The second ground is that defendant was denied the right to consult counsel. For two reasons it is plain that this is no ground for dismissal. First, it is axiomatic that a witness is not entitled to counsel (People v. Brayer, 6 A.D.2d 437, 179 N.Y.S.2d 248; cf. In re Groban, 352 U.S. 330, 77 S.Ct. 510, 1 L.Ed.2d 376). Secondly, the record shows that defendant had the benefit of his counsel's advice as to his rights. What he complains about is that as a particular question was asked he requested leave to consult counsel before answering. Such disruptive tactics could render any grand jury proceedings nugatory.

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The third, and weightiest objection is as to whether the testimony given can itself be the basis of any criminal charge. Certain background facts are essential to any discussion of this issue. The grand jury inquiry was into the taking of bribes by police officers. Defendant was called as a witness who was believed to have some knowledge of this situation. A reading of the record leads to the conclusion, we believe inevitably, that the prosecutor believed that defendant was in all probability either a giver of the bribes or at least intimately connected with the transactions, but that he (the prosecutor) was not seeking to indict the defendant for that or any other crime. In fact, the prosecutor stated on the record his willingness to have the grand jury grant defendant immunity as to any transaction testified to, should the defendant request it. Instead, the defendant did not claim his privilege but evaded answering to a degree amounting to refusal.

Prior to the enactment of Penal Law section 2447, a person subpoenaed before the grand jury automatically enjoyed immunity as to any matters on which he was questioned regardless of whether he asserted privilege or asked for immunity (People ex rel. Lewisohn v. O'Brien, 176 N.Y. 253, 68 N.E. 353; People v. Sharp, 107 N.Y. 427, 14 N.E. 319; People v. Reiss, 255 App. Div. 509, 8 N.Y.S.2d 209, aff'd. 280 N.Y. 539, 20 N.E.2d 8). It was, however, felt that it was unfair, if a prosecutor in examining a witness before the grand jury incidentally discovered that the witness was guilty of some criminal activity, for the witness to escape prosecution for this reason (see People v. Tenaglia, 30 Misc.2d 1013, 1019, 220 N.Y.S.2d 203, 210). Apparently so far as the section carries out this purpose it is effectual, but not beyond that. So, while the section is said to be viable as to a true witness (People v. Steuding, 6 N.Y.2d 214, 217,

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189 N.Y.S.2d 166, 167, 160 N.E.2d 468, 469), it is unconstitutional as whittling away the privilege of one who is a prospective defendant (People v. Laino, 10 N.Y.2d 161, 218 N.Y.S.2d 647, 176 N.E.2d 571).

It has always been recognized that crimes growing out of the giving of testimony itself such as perjury or contempt, stand upon a somewhat different footing than crimes revealed by testimony. Where a witness contumaciously refuses to answer before the grand jury he can be prosecuted for contempt quite regardless of the fact that he may enjoy immunity as to the transactions as to which he refused to testify (Matter Prensky v. Geller, 22 A.D.2d 559, 257 N.Y.S.2d 492, leave to appeal denied 16 N.Y.2d 486, cert. denied 384 U.S. 101). Similarly, an indictment for perjury will lie where the answers are false (People v. Feinberg, 19 Misc.2d 433, 193 N.Y.S.2d 937). To this there has always been an exception, that the person against whom the grand jury inquired is directed may not be prosecuted for any dereliction in regard to the testimony. This is not on the ground that he enjoys immunity, but because it is illegal to bring him before the grand jury in the first place, he is furthermore illegal to administer the oath, so that any step taken thereafter consequential on the taking of the oath is a nullity (People v. Gillette, 126 App.Div. 665, 670, 111 N.Y.S. 133, 136). That exception has not been affected by section 2447 (People v. De Feo, 308 N.Y. 595, 127 N.E.2d 592).

We come now to whether the defendant comes within the class of excepted persons. The current fashionable expression for persons so exempted is "target of the investigation." The brilliant color of the phrase obscures the fact that nobody knows exactly what it means. Clearly if defendant is one of the persons against whom the investigation is directed and whose indictment is

the contemplated result of the investigation, he is exempted (People v. Gillette, supra; People v. Laino, supra). If he is merely a person having knowledge of the facts but apparently not implicated in the wrongdoing, it is equally clear that he is not. But most instances fall within these boundaries, and the persons described, while not the target, are within the target area. That is, they are suspected, more or less substantially, of some criminal activity in connection with the matter under investigation. The defendant here would come within this classification.

It quite often happens that in order to obtain an indictment as well as to get a conviction, a prosecutor must rely on the testimony of persons themselves criminally involved in the matter. This testimony is seldom proffered voluntarily. The prosecutor must make a conscious choice between those persons against whom he will proceed and those he will excuse, in order to obtain any indictment. It would seem that once the prosecutor has made such an election, the person exempted ceases to be even a potential defendant. The proffer of immunity is completely inconsistent with subsequent indictment (see People v. Feinberg, supra, 19 Misc.2d at p. 440, 193 N.Y.S.2d at p. 945, Geller, J.).

There can be no question but that that is the situation here. The defendant was specifically informed that he was being called as a witness only and that the grand jury was prepared to give him immunity if he requested it. Nothing could have been clearer than that the district attorney was prepared to forego any effort to proceed against the defendant and no matter what his testimony revealed, and there is no claim that this was not thoroughly understood by him. It follows that the point made in the majority opinion that defendant did not

receive immunity is entirely immaterial. The sole question is whether he is a person to whom a grant of immunity would be effectual, in the sense that it would require him to testify. If he is within that class, no grant invokes any sanction for refusing to, or evading answering. If he is not, he is not excused because of his advised failure to claim his privilege.

To hold that this defendant, or anyone similarly situated, is a target and hence exempted means that the prosecuting office has no option as to which persons shall be prosecuted, and that in a situation where one of the malefactors is the sole source of the evidence, all must go free. We cannot conceive that the situation so mandates.

The order entered June 22, 1966 should be reversed on the law and the indictment reinstated.

BENJAMIN J. RABIN, J., concurs.

APPENDIX E

Extract of Grand Jury Proceedings (June 11, 1964)

[A. 41]

* * * * *

Q. Do you recall having this conversation with Mr. Cohen in September of 1963, and listen to it and see if it refreshes your recollection.

You said to Mr. Cohen, "The story is this. I saw a couple of People. Did Hy tell you?"

And Mr. Cohen replied, "No."

And you said, "This guy don't tell you nothing."

And Benny Cohen said, "I haven't spoken to him."

And you reply, "So, I saw a couple of people and there were three shops on the hit row, you know."

And Benny Cohen says, "Yeah."

And you said to Mr. Cohen, "And you were one of the shops on the hit parade."

[A. 42]

And Benny said, "Uh huh."

And then you said, "But the guy told me he was on vacation for about two weeks."

And Benny Cohen said, "Yeah."

And you replied, "So, er, the guy says later that Hy was with me for some breakfast, you know."

Benny said, "Yeah, go ahead."

And you said, "These guys didn't effect on the foreclosure."

Benny answers, "Yes."

And you said, "And he says there was no foreclosure on you. Do you follow?"

Do you remember having such a conversation in September of 1963 with Benny Cohen? A. Definitely not. Doesn't even sound like my phraseology.

Q. You deny—— A. I'm not denying. I don't recall.

Q. When you say you don't recall does that mean it didn't happen or you have no recollection of it, it might have happened? A. Well, the phrases themselves don't seem like my language.

* * * * *

APPENDIX F

Proceedings of June 24, 1974

[A. 458]

SUPREME COURT

NEW YORK COUNTY

CRIMINAL TERM: PART 30

Indictment No. 2482—69

THE PEOPLE OF THE STATE OF NEW YORK

—against—

MATTHEW IANNIELLO,

Defendant.

New York, New York,
June 24, 1971

Before: HON. HAROLD BIRNS, *J. S. C.*

APPEARANCES:

THE PEOPLE OF THE STATE OF NEW YORK
By: KENNETH CONBOY, ESQ.
Assistant District Attorney
MAURICE EDELBAUM
Attorney for Defendant

STEVEN SCHATZMAN
Official Court Reporter

[A. 459]

The Clerk: On the sentence calendar Matthew Iiannello.
(Defendant at the bar.)
The Clerk: Is your name Matthew Iianniello?
The Defendant: Yes, sir.

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The Clerk: Now is Maurice Edelbaum, who is present in court, your lawyer?

The Defendant: Yes, sir.

The Clerk: You are arraigned before this court for sentence on your—

Mr. Edelbaum: There are some motions to be made first—

The Court: I will hear you on the motions after the arraigning.

The Clerk: Now you are arraigned before this court on your conviction by verdict of the crime of criminal contempt in the first, second and fourth counts.

Mr. Edelbaum: May it please your Honor I would first like to renew my application to inspect the orders if there are any granting the District Attorney the right to intercept [A. 460] the telephone of the defendant both at his business and at home and any bugs that may have been put in his office to intercept conversations that took place in his office. I renew my application to inspect those orders to see whether or not if they were properly granted and under probable cause.

Secondly, I ask for the right to inspect and listen to any and all tapes that were used by the District Attorney in the interrogation of this defendant before the Grand Jury, and it will become apparent as we proceed for that.

Your Honor, I first move to set aside the verdict of the jury upon the grounds that it was clearly against the weight of the evidence, in that the District Attorney utterly failed to produce any evidence of the ultimate fact—ultimate fact and facts about which the defendant was interrogated. He was asked whether certain incidents did or did not take place, and his answers were that he couldn't say, couldn't say if they did or couldn't say if they didn't. I submit to your Honor the only evidence in this [A. 461] case submitted was the actual testimony

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before the Grand Jury and testimony of the acting foreman as to the fact, and facts about which the Grand Jury was interrogating the defendant, what took place before the Grand Jury. There was no evidence of any kind by a live witness to establish that the ultimate facts did actually take place about which the defendant was being interrogated.

And further your Honor, I move to set aside the verdict of the jury, the jury, your Honor, upon the grounds that the Fourth Amendment rights of this defendant was violated when called before the Grand Jury by reason of the interception of his telephone by reason of any bugs that may have been placed in his place of business.

And upon the grounds that the District Attorney violated his Fourth Amendment rights permitted an illegal act in doing so and for that reason they had no right to question this defendant after having violated his Fourth Amendment rights and violated his privacy about any of the matters, any of the information that [A. 462] they gained by reason of the violation of the Fourth Amendment of the Constitution. And I say that the District Attorney cannot gain advantage having committed illegal acts and I would like to cite, your Honor, the recent case cited in the United States Court of Appeals Third Circuit, decided on May 28, 1971 in the matter re: Grand Jury Proceedings in Harrisburg, Pennsylvania in the matter of Joques Ezan, Appellant. And the court there started out by saying the primary issued raised by this appeal is whether a citizen who is summoned before the Grand Jury may object to some questions based on information obtained through allegedly illegal and decided unconstitutional wire taping directed against witnesses because of the great importance of what is at stake here. Not only the interrogation of the provisions of the ominous crime and control it is an act dealing with unnoticed electronic

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surveillance. Also the violation of the Fourth Amendment. We intend to set forth our views in some detail.

I might say, your Honor, that this case [A. 463] was deemed of such great importance that the court was convened in banc. Ordinarily three judges sit in the United States Court of Appeals here as also read in the newspapers about how this court considered this case of such importance that they sat in banc and the court found that the District Attorney could not use information obtained and it was in violation of the Fourth Amendment rights.

And it is quite apparent, your Honor, it is quite apparent you sat in this case and you heard questions that were read to the jury who convicted this defendant that the information about which they interrogated this defendant had to come from wire taps because the exact questions were directed to the defendant, whether or not he did or did not say something to a particular person on a certain day.

I say to your Honor the reason why I have asked for the listening to the tapes and to see if whether or not they were legal tapes is because there is additional grounds of privilege. The [A. 464] defendant was interrogated about a conversation he had with a lawyer by the name of Peter Lagansky. He was asked whether or not he asked him or spoke to him that would be additional grounds of disqualification to inquire of that because of the fact that there is absolute privilege between an attorney and a client. And, in addition to that, the defendant's telephone at home was bugged and there were conversations, enumerable conversations between his wife and himself and that is absolute privilege.

There are cases cited in this opinion that were handed down on May 28, 1971. I say to your Honor that there

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are a series of constitutional questions in this case. There are a series of questions as to whether or not the defendant was properly convicted in the manner that the District Attorney presented in this case to the jury. And evidence introduced before the jury and for all of those reasons, your Honor, I respectfully move to set aside the verdict of the jury and urge that your Honor grant me my application to [A. 465] inspect the orders, if any, of that proceed and permit these wire taps may well be that the District Attorney may concede for this record, that the wire taps were illegal, because I see my friend smiling because that happened even though the orders may have been obtained.

It has been decided on numerable occasions orders were not properly obtained. So for all of those reasons, your Honor, I urge my application be granted.

Mr. Conboy: Very briefly, your Honor, on this question Mr. Edelbaum raises as to absence of ultimate facts—

Mr. Edelbaum: Excuse me. I forgot one thing, your Honor, with respect to whether or not the conversation between Mr. Ianniello and his counsel is privileged or not. Whether or not he had a right to argue under the Fourth Amendment. You know there was a finding here that he had no right—he requested to go out to speak to his attorney because he wanted to ask his attorney what to answer and became quite apparent that this man [A. 466] who is not schooled in law wanted to find out from his lawyer, Can they tap my wire, get information and then ask me questions about it? That would be a proper question he properly urged and refused to answer on the ground of the Fourth Amendment. He was never permitted to go outside and speak to his lawyer at that time to be properly advised as to that. So I say to your Honor as additional grounds he was prevented from adequate

assistance of counsel during that time and I urge that under the Fifth Amendment of the Constitution.

So on all these grounds, your Honor, I rest my argument. Thank you.

Mr. Conboy: I would like briefly to allude to Mr. Edelbaum's first point. He asserts that you are to set aside the verdict of this jury on the ground that the evidence in the record does not include evidence that the facts on which interrogated—about which he was interrogated actually occurred. Your Honor, we discussed this at great length at a pre-trial [A. 467] motion. At this time you will recall that I respectifully pointed out to the Grand Jury factual evidence that these particular matters had occurred would be of little—I mean that Mr. Ianniello in good faith went before the Grand Jury. He was given immunity.

He was examined on various meetings and conversations on which he was in position to do so. The Grand Jury thought he did give ultimate testimony and ultimate evidence. Your Honor, he did not do so. That was found to be legal fact by the Grand Jury. Legal fact by the Petit jury that convicted him.

Though there is no case in New York State and no case as far as I know in the entire body of this country which asserts that the criminal contempt must be based upon actual evidence. Now, your Honor, the Court of Appeals ruled on evidence virtually identical in character submitted to this jury.

Now the leading cases People versus Sabastien and People against Moran and People [A. 468] against Castello. There are a series of such cases, your Honor.

Now the second point is the application for the discovery order and affidavit which underlines certain wire

tapings done in this investigation. Mr. Edelbaum cites a case in the Third Circuit matter involving Joques Ezan. The investigation was based upon statutes in 1968. Now the Attorney General of the United States apparently engaged in wire taping under that statute without properly —I point out to your Honor the crucial distinction of the court order in this case.

I would further point out though the Court of Appeals Third Circuit does allude to the Fourth Amendment, it's wholly based upon the construction of the statute in question. That statute is relevant to that case; it is relevant particularly in view of the fact that the New York Court of Appeal People against Castello and the United States Supreme Court in United States against Lonso already ruled quite clearly on the [A. 469] point that the witness was given immunity can be made to stand challenged.

The legality of any wire taping or eavesdropping. On this question of privilege I would point out that Mr. Edelbaum had a transcript of Mr. Ianniello's Grand Jury appearances month and months, in fact, years before trial commenced.

I point out to your Honor you personally called him to the bench and asked if there were any motions to make on the basis of those facts. He did make a number of motions for the first time an argument that the defendant's privilege—his privilege of confidence with an attorney Peter Lagansky was violated in the Grand Jury appearance.

I will remind your Honor this took place in 1964. Now I point out Mr. Ianniello's own testimony in the Grand Jury asserted there was nothing to discuss of any particular confidential nature in dealing with his attorney.

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They did discuss broad constitutional questions. Your Honor, Mr. Edelbaum suggests that these privileges [A. 470] were violated. In any case, the ultimate legal question is did the defendant invoke his privilege or did in fact waive anything at all about those witnesses in the accessment evaluation of commitment of that or interrogation on that subject. Frankly, it is trivial in terms of overall record or breach of privilege.

Now, your Honor, Mr. Edelbaum suggests some kind of violation between Mr. Ianniello and his wife. First of all, Mr. Edelbaum suggests that conversations were recorded over Mr. Ianniello's telephone—home telephone. I am not prepared to assert whether in fact this is the case or not. I think it is speculation that there was a tap or an invasion of privilege of Mr. Ianniello and his wife.

I submit to your Honor it is speculation and nothing more. I insist I want a hearing for that. I submit to your Honor a lawyer who comes into court seven years after the indictment has handed up, after the matter has been in the Court of Appeals and back, and after the Petit Jury and after the trial convicted his client, now asserts [A. 471] a right to such a hearing. I submit that on the litigation in this case is a frivolous argument and think it should be rejected.

The Court: Having heard arguments with respect to each one of the motions; motion denied.

Mr. Edelbaum: I have an exception, your Honor.

The Court: Now the question of sentence, arraign the defendant.

* * * * *

APPENDIX G

Questions Presented for Review in the New York Court of Appeals

The following is the verbatim text of the questions presented for review as contained in the petitioner's brief in the New York Court of Appeals.

1. Should the trial court have conducted a hearing to determine whether the questioning of appellant before the Grand Jury was the fruit of illegal electronic surveillance? If so, what standard is to be used in determining the legality of the electronic surveillance?

2. If the questioning was the fruit of illegal electronic surveillance, does the decision of the Supreme Court of the United States in *Gelbard* v. *United States*, 408 U.S. 41 (1972) require that the appellant's conviction for contempt be vacated?

3. If the questioning of appellant was predicated upon electronic surveillance, whether legal or illegal, should appellant have been furnished, at the time of his Grand Jury testimony, with a copy of any of his intercepted conversations which related to that testimony, particularly since he expressed a lack of recollection with regard to a number of the questions put to him by the interrogators?

4. Following his indictment, was appellant entitled to a copy of his intercepted communications so as to prepare for trial and so as to present a defense to the charge of contempt?

5. Since the intercepted conversations of the appellant were not in evidence nor even revealed to the defense, was appellant deprived of his Sixth Amendment right to

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confrontation by the prosecutor's claim, in summation, that certain alleged extracts from those conversations, as read to appellant before the Grand Jury, were verbatim quotations?

6. Did the trial court improperly remove from the jury's consideration two of the essential elements of the crime charged: relevancy and propriety of the questions which had been put to appellant before the Grand Jury?

7. Did the trial court improperly remove from the jury's consideration the question of whether the appellant's lack of access to his attorney should be considered in determining whether he was guilty of the crime charged?

8. Was appellant deprived of his Fifth Amendment right against self-incrimination and otherwise improperly prejudiced by the admission into evidence of certain of his testimony which had been given under a grant of immunity and which was not related to the charges of the indictment?

APPENDIX H

Pertinent Text of the Constitutional and Statutory Provisions Involved

United States Constitution:

Article Six, Clause Two

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment Four

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment Fourteen, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

Pertinent Text of the Constitutional and Statutory Provisions Involved

Laws of the United States

47 U.S.C., Section 605

§ 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or asssisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein

contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

47 U.S.C. Section 501

§ 501.

General penalty

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to me unlawful, or who willfully and knowingly omits or fails to do any act, matter or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both. June 19, 1934, c. 652, Title V, § 501, 48 Stat. 1100; Mar. 23, 1954, c. 104, 68 Stat. 30.

APPENDIX H

Pertinent Text of the Constitutional and Statutory Provisions Involved

Laws of the State of New York

Former New York Penal Law, Section 600 (6)

"§ 600. Criminal contempt.

"A person who commits a contempt of court of any one of the following kinds, is guilty of a misdemeanor:

* * * * *

"6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory;

* * * * *